IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
February 6, 2007 Session

DOUG SATTERFIELD, As Personal Representative of the Estate of Amanda Nicole Satterfield, Deceased v. BREEDING INSULATION COMPANY, INC., and ALCOA INC., f/k/a ALUMINUM COMPANY OF AMERICA

Direct Appeal from the Circuit Court for Blount County
No. L-14000 Hon. W. Dale Young, Circuit Judge

No. E2006-00903-COA-R3-CV - FILED APRIL 19, 2007

Plaintiff's Action alleged that as a child she was exposed to her father's clothing which was contaminated in his workplace with defendant, and that defendant knew the contamination was toxic and would cause injuries. She further alleged that as a child she was exposed to her father's contaminated clothing on a regular basis, causing her terminal illness. After the Complaint was filed plaintiff died and her father was named as party-plaintiff as the personal representative of her Estate. The pleadings were amended to plead a wrongful death action. The Trial Court, responding to a Tenn. Rules Civ. P. 12 Motion, dismissed the action for failure to state a cause of action and plaintiff has appealed. On appeal, we reverse the Trial Court and reinstate the action for further proceedings.

Tenn. R. App. P.3 Appeal as of Right; Judgment of the Circuit Court Reversed and Remanded.

HERSCHEL PICKENS FRANKS, P.J., delivered the opinion of the court, in which D. MICHAEL SWINEY, J., and SHARON G. LEE, J., joined.

Gregory F. Coleman, Knoxville, Tennessee, for appellant.

John A. Lucas, John T. Winemiller, Thomas Hale, and Harry Douglas Nichol, Knoxville, Tennessee, and John Charles Thomas, Hunton & Williams, LLP., Richmond, Virginia, for appellee.

OPINION

Background

On December 8, 2003, Amanda Satterfield filed a Complaint with the Knox County Circuit Court against Breeding Insulation Company, Inc. ("Breeding") and Aluminum Company of America ("Alcoa"). The Complaint charged that Ms. Satterfield contracted mesothelioma "[a]s a direct and proximate result of her exposure to Alcoa's asbestos-containing products, and:

> Defendants have done business in the State of Tennessee by selling, distributing, installing, fabricating, supplying, removing, and otherwise using asbestos-containing products, the use of which products by [Plaintiff's] father, Doug Satterfield, an employee of Defendant [Alcoa], caused Plaintiff to be exposed to and to inhale or ingest injurious asbestos fibers, directly and proximately causing her asbestos-related disease, which is the subject of this complaint.

The Complaint averred that Satterfield's father, Doug Satterfield, began working at Alcoa's facilities in Alcoa, Tennessee in the 1970's, and that he was so employed for Alcoa from May 1973 to September 1975, and returned to Alcoa in September 1978 after serving in the Army for three years. Upon his return to Alcoa, he worked as a Reclamation Furnace Operator. "Furnace restoration and removal work in his immediate work area included the installation of asbestos block insulation . . . ." "[H]e was daily exposed to asbestos dust and asbestos containing products." "Everyday, Mr. Satterfield returned home in clothes covered in the dust from his day at [Alcoa]." In 1980, Mr. Satterfield became a mechanical specialist, conducting pipefitting and mechanical work involving the removal of asbestos insulation. He continued to wear dusty work clothes home on a daily basis.

In September 1979, Amanda Nicole was prematurely born to Doug and Donna Satterfield. During the child's three-month hospital stay, Mr. Satterfield visited her directly from work and stayed with her every evening.

The Complaint alleged that Mr. Satterfield's use of asbestos products and inadvertent introduction of asbestos dust and fibers into the Satterfield home exposed Amanda Satterfield to such dust and fibers throughout her childhood.

The Complaint further averred that as early as 1965 Alcoa knew about insulation and maintenance workers' exposure to asbestos, but never warned Mr. Satterfield of the risks of asbestos exposure:

> The Complaint further states:
>
> Even though [Alcoa] was familiar with reports of family member contraction of mesothelioma from workers' clothes as early as 1968 and worker contraction of

> mesothelioma from intermittent exposures as early as 1964, at no time did [Alcoa] advise [Mr] Satterfield of these risks so that he could take reasonable precautions.

The Complaint alleged that Alcoa had been aware of the high levels of asbestos on its workers' clothes since 1973, but did not provide workers with protective clothing and discouraged workers' from using an on-site bathhouse. In addition, the Complaint alleged that Alcoa did not provide respirators or dust masks.

The Complaint sought damages and punitive damages based upon theories of negligence; negligence per se; failure to warn; negligent hiring, training, and supervision; strict liability; and breach of warranty.

The case was transferred to the Blount County Circuit Court, and Alcoa Answered on February 11, 2004. The Answer asserted the Complaint failed to state a claim or cause of action against Alcoa upon which relief could be granted. The Answer also denied that it proximately caused any of Ms. Satterfield's injuries or damages.

On January 1, 2005, Ms. Satterfield died, and her father, Mr. Satterfield asked the Circuit Court to substitute him as the Party Plaintiff. The Court entered an Order substituting Mr. Satterfield as Party Plaintiff and an Order allowing Satterfield to amend the Complaint to assert that the Defendants' acts and omissions proximately caused Ms. Satterfield's death.

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In December 2005, Alcoa filed a Motion for Judgment on the Pleadings, and attached to the Motion's supporting memoranda three exhibits: (1) an opinion piece from the Rocky Mountain Press, (2) another opinion piece from the Wall Street Journal, and (3) an *amicus curiae* brief filed in another case, which argued that landowners owe no duty to plaintiffs injured off-site through secondhand exposure to hazards on the property.

In January 2006, Plaintiff filed a Motion to Strike these exhibits, arguing that the exhibits concern matters outside the pleadings, and also filed a Brief in Opposition to the Defendants' Motion for Judgment on the Pleadings.

The Trial Court's Rulings

The Trial Court's Memorandum states:

> As to Plaintiff's Motion to Strike Defendant [Alcoa's] filings in connection with its Motion for Judgment on the Pleadings, the Court has carefully considered those filings and find the Motion is not well-taken and is overruled.
>
> The sole and only issue remaining before the Court is whether or not, as a matter of law, [Alcoa] owed a legal duty to Amanda Nicole Satterfield.

> At first blush, the Court readily concludes that there is no provision in Tennessee law (either through the Legislature or Court interpretation) which imposes on Defendant [Alcoa] a legal duty to a third party under the facts and circumstance[s] of this case.

The Circuit Court then entered an Order overruling the Plaintiff's Motion to Strike and granting Alcoa's Motion for Judgment on the Pleadings.

The Plaintiff filed a Notice of Voluntary Dismissal as to Breeding.

Issues on Appeal

1. Whether the Circuit Court erred in not converting Alcoa's Motion for Judgment on the Pleadings into one for summary judgment.

2. Whether the Circuit Court erred in granting Alcoa's Motion for Judgment on the Pleadings.

As to the first issue, Rule 12.03 of the Tenn. R. Civ. P., governs Motions for Judgment on the Pleadings, which states:

> After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings. *If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment* and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

Plaintiff's Motion to Strike argued that the exhibits "should be struck and no consideration whatsoever given them in the Court's determination of Alcoa's Motion . . . ." However, "Trial courts[, however,] have discretion to accept or exclude matters beyond the pleadings . . . ." *Pac. E. Corp. v. Gulf Life Holding Co.*, 902 S.W.2d 946, 952 (Tenn. Ct. App. 1995) (discussing identical conversion language in Rule 12.02); *accord Hixson v. Stickley*, 493 S.W.2d 471, 473 (Tenn. 1973).[1]

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[1]Rule 12.02 states,

> If, on a motion asserting the defense numbered (6) to dismiss for failure to state a claim upon which relief can be granted, *matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment* and disposed of as provided in Rule 56 . . . .

Tenn. R. Civ. P. 12.02 (2005) (emphasis added).

The Plaintiff argues that these exhibits are matters outside the pleadings and were not excluded by the Trial Court; Tenn. R. Civ. P. 12.03 obliged the Circuit Court to convert Alcoa's motion into one for summary judgment.

The threshold issue is whether Alcoa's exhibits were matters outside the pleadings. Tennessee's limited case law on this issue views "matters outside the pleadings" as "extraneous evidence." *Pac. E. Corp.*, 902 S.W.2d at 952; *D.T. McCall & Sons v. Seagraves*, 796 S.W.2d 457, 459 (Tenn. Ct. App. 1990). Federal courts[2] "'view 'matters outside the pleading[s]' as including any written or oral evidence in support of or in opposition to the pleading that provides some substantiation for and does not merely reiterate what is said in the pleadings.'" *BJC Health Sys. v. Columbia Cas. Co.*, 348 F.3d 685, 687 (8th Cir. 2003) (quoting *Gibb v. Scott,* 958 F.2d 814, 816 (8th Cir.1992)); *accord Song v. City of Elyria*, 985 F.2d 840, 842 (6th Cir. 1993); *Concordia v. Bendekovic*, 693 F.2d 1073, 1075 (11th Cir. 1982). Matters that are "mere argument"—memoranda, briefs, and oral arguments—will not trigger the conversion process. *County of Santa Fe v. Public Serv. Co. of N.M.*, 311 F.3d 1031, 1035 (10th Cir. 2002); *Ghartey v. St. John's Queens Hosp.*, 869 F.2d 160, 162 (2d Cir. 1989); *Concordia*, 693 F.2d at 1075; *Sardo v. McGrath*, 196 F.2d 20, 23 (D.C. Cir. 1952).

The exhibits at issue were attached to Alcoa's memorandum in support of its Motion. The memorandum argued that Alcoa had no duty of care to Ms. Satterfield, and it presented both legal and public policy arguments.[3] The memorandum cited the exhibits as part of its public policy argument concerning the potential proliferation of asbestos claims, and the exhibits did not present evidence challenging the factual allegations in the Plaintiff's Complaint. Under these circumstances, the exhibits were mere argument and did not constitute matters outside the pleadings. Accordingly, the exhibits do not convert Alcoa's Rule 12.03 motion into one for summary judgment.

The Plaintiff's Complaint averred that Alcoa's negligence resulted in Ms. Satterfield's exposure to asbestos via her father's contaminated work clothing. A negligence claim requires proof of the following elements: "(1) a duty of care owed by the defendant to the plaintiff; (2) conduct by the defendant falling below the standard of care amounting to a breach of that duty; (3) an injury or loss; (4) cause in fact; and (5) proximate or legal cause." *West v. E. Tenn. Pioneer Oil Co.*, 172 S.W.3d 545, 550 (Tenn. 2005); *accord McCall v. Wilder*, 913 S.W.2d 150, 153 (Tenn. 1995); *Lett v. Collis Foods, Inc.*, 60 S.W.3d 95, 99 (Tenn. Ct. App. 2001).

Alcoa's Motion for Judgment took issue with the first of these elements, by arguing

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[2]Rules 12.02 and 12.03 of the Tennessee Rules of Civil Procedure are patterned on Rules 12(b) and 12(c) of the Federal Rules of Civil Procedure. Therefore, federal decisions provide helpful guidance in interpreting Tennessee's procedural rules. *Pac. E. Corp.*, 902 S.W.2d at 952 n.7.

[3]"[C]onsiderations of public policy are crucial in determining whether a duty of care existed in a particular case." *Burroughs v. Magee*, 118 S.W.3d 323, 329 (Tenn. 2003).

it owed no legal duty to Ms. Satterfield; and the Circuit Court agreed with Alcoa's argument and granted Alcoa's Motion to Dismiss.

In reviewing a trial court's ruling on a motion for judgment on the pleadings, we must treat as true "all well-pleaded allegations contained in the pleadings" of the non-moving party "and all reasonable inferences drawn therefrom." *McClenahan v. Cooley*, 806 S.W.2d 767, 769 (Tenn. 1991). All allegations of the moving party which the non-moving party denies will be treated as false. *Id.* "Conclusions of law are not admitted nor should judgment on the pleadings be granted unless the moving party is clearly entitled to judgment." *Id.*

This appeal turns upon the first element of negligence, i.e., whether Alcoa owed a duty of care to protect Ms. Satterfield from exposure to asbestos via her father's asbestos-contaminated work clothing. This is a question of law. *West*, 172 S.W.3d at 550; *Burroughs v. Magee*, 118 S.W.3d 323, 327 (Tenn. 2003). "Properly defined, duty is the legal obligation owed by defendant to plaintiff to conform to a reasonable person standard of care for the protection against unreasonable risks of harm." *McCall*, 913 S.W.2d at 153. Determining the existence of a duty requires consideration of whether "such a relation exists between the parties that the community will impose a legal obligation upon one for the benefit of others--or, more simply, whether the interest of the plaintiff which has suffered invasion was entitled to legal protection at the hands of the defendant." *Lindsey v. Miami Dev. Corp.*, 689 S.W.2d 856, 859 (Tenn. 1985) (quoting W. Page Keeton et al., *Prosser and Keeton on the Law of Torts*, § 37, at 236 (5th ed. 1984) [hereinafter "*Prosser*"]); *accord Turner v. Jordan*, 957 S.W.2d 815, 818 (Tenn. 1997); *Bradshaw v. Daniel*, 854 S.W.2d 865, 869–70 (Tenn. 1993). "Thus, the imposition of a legal duty reflects society's contemporary policies and social requirements concerning the right of individuals and the general public to be protected from another's act or conduct." *Bradshaw*, 854 S.W.2d at 870.

Tennessee's courts utilize a balancing approach to align these social policies and requirements with the imposition of a legal duty. *Biscan v. Brown*, 160 S.W.3d 462, 480 (Tenn. 2005). This balancing approach determines whether an actor's conduct is unreasonable by balancing the foreseeability and gravity of harm against the burden of the proposed legal duty:

> A risk is unreasonable and gives rise to a duty to act with due care if the foreseeable probability and gravity of harm posed by defendant's conduct outweigh the burden upon defendant to engage in alternative conduct that would have prevented the harm.
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> Several factors must be considered in determining whether a risk is an unreasonable one. Those factors include the foreseeable probability of the harm or injury occurring; the possible magnitude of the potential harm or injury; the importance or social value of the activity engaged in by defendant; the usefulness of the conduct to defendant; the feasibility of alternative, safer conduct and the relative costs and burdens associated with that conduct; the relative usefulness of the safer conduct; and the relative safety of alternative conduct. Stated succinctly, a duty of reasonable care exists if defendant's conduct poses an unreasonable and foreseeable

risk of harm to persons or property.

McCall, 913 S.W.2d at 153 (citing *Restatement (Second) of Torts,* §§ 291–93 (1964)) (citations omitted); *accord Biscan*, 160 S.W.3d at 478–80; *McClung v. Delta Square Ltd. P'ship*, 937 S.W.2d 891, 901 (Tenn. 1996).

"Although all the balancing considerations are important, the foreseeability prong is paramount because '[f]oreseeability is the test of negligence.'" *Biscan*, 160 S.W.3d at 480 (quoting *Doe v. Linder Const. Co., Inc.*, 845 S.W.2d 173, 178 (Tenn. 1992)).

> The risk involved is that which is foreseeable; a risk is foreseeable if a reasonable person could foresee the probability of its occurrence or if the person was on notice that the likelihood of danger to the party to whom is owed a duty is probable. . . . If the injury which occurred could not have been reasonably foreseen, the duty of care does not arise, and even though the act of the defendant in fact caused the injury, there is no negligence and no liability. "[T]he plaintiff must show that the injury was a reasonably foreseeable probability, not just a remote possibility, and that some action within the [defendant's] power more probably than not would have prevented the injury." Foreseeability must be determined as of the time of the acts or omissions claimed to be negligent.

Linder Const. Co., Inc., 845 S.W.2d at 178 (quoting *Tedder v. Raskin*, 728 S.W.2d 343, 348–49 (Tenn. Ct. App. 1987)) (citations omitted).

Alcoa argues that it owed no duty of care to Ms. Satterfield because her exposure did not occur on Alcoa's premises and did not involve its chattel; thus, during the moments of exposure, Alcoa had no "special relationship" with Mr. Satterfield giving rise to a duty on the part of Alcoa to control his actions.[4] This argument assumes that Alcoa's conduct was merely nonfeasance[5] which

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[4]This argument relies upon § 317 of the *Restatement (Second) of Torts* which provides,

> A master is under a duty to exercise reasonable care so to control his servant while acting outside the scope of his employment as to prevent him from intentionally harming others or from so conducting himself as to create an unreasonable risk of bodily harm to them, if
>
> (a) the servant
>
> (I) is upon the premises in possession of the master or upon which the servant is privileged to enter only as his servant, or
>
> (ii) is using a chattel of the master, and
>
> (b) the master
>
> (I) knows or has reason to know that he has the ability to control his servant, and
>
> (ii) knows or should know of the necessity and opportunity for

is a basis for liability only if there was a "special relationship" between Alcoa and Mr. Satterfield at the moments of Ms. Satterfield's exposure.[6] Plaintiff asserts in the Complaint that Alcoa's conduct was not merely nonfeasance, but was misfeasance:

> Alcoa is liable because Alcoa actively inflicted the harm on [Ms. Satterfield] by releasing asbestos toxins into her house. [Mr. Satterfield] was merely a vehicle for the transmission of a toxic substance into the Satterfield home placed there by the negligent actions of Alcoa which were a proximate cause of the injuries and ultimate demise of [Ms. Satterfield].

Because Plaintiff's allegations do not hinge upon Alcoa's control of Mr. Satterfield, Alcoa's liability

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exercising such control.

Restatement (Second) of Torts § 317 (1965). No Tennessee case has expressly adopted or rejected § 317. *Lett*, 60 S.W.3d at 100 ("It is unclear whether Tennessee has adopted § 317 of the Restatement relating to employer-employee relationships . . . .").

[5]Although everyone has a duty "to use reasonable care to refrain from conduct that will foreseeably cause injury to others," this duty does not include an obligation to protect another from the conduct of a third person. *Turner*, 957 S.W.2d at 818; *accord Biscan*, 160 S.W.3d at 478; *Bradshaw*, 854 S.W.2d at 870. Thus, the law draws a distinction between creating an unreasonable risk of harm to others (i.e., misfeasance) and merely failing to protect others from harm (i.e., nonfeasance). *Bradshaw*, 854 S.W.2d at 870–71. "'[T]he reason for the distinction may be said to lie in the fact that by 'misfeasance' the defendant has created a new risk of harm to the plaintiff, while by 'nonfeasance' he has at least made his situation no worse, and has merely failed to benefit him by interfering in his affairs.'" *Id.* (quoting *Prosser*, § 56, at 373).

[6] Under the special relationship doctrine, nonfeasance is a basis for liability when "the defendant stands in some special relationship to either the person who is the source of the danger, or to the person who is foreseeably at risk from the danger." *Bradshaw*, 854 S.W.2d at 871; *accord Biscan*, 160 S.W.3d at 478–79. Specifically, the courts of this state have adopted § 315 of the *Restatement (Second) of Torts*. *Lett*, 60 S.W.3d at 99; *Newton v. Tinsley*, 970 S.W.2d 490, 492 (Tenn. Ct. App. 1997). Section 315 provides,

> There is no duty so to control the conduct of a third person as to prevent him from causing physical harm to another unless
>
> (a) *a special relation exists between the actor and the third person which imposes a duty upon the actor to control the third person's conduct*, or
>
> (b) a special relation exists between the actor and the other which gives to the other a right to protection.

Restatement (Second) of Torts § 315 (1965) (emphasis added).

is not dependent upon the existence of a "special relationship" between Alcoa and Mr. Satterfield. *West*, 172 S.W.3d at 551.[7] Therefore, the aforementioned balancing test is appropriate to determine whether Alcoa owed a duty to Ms. Satterfield.

As above stated, "[f]oreseeability is the test of negligence." *Linder Const. Co., Inc.*, 845 S.W.2d at 178. The Complaint provides numerous allegations that Alcoa understood that (1) exposure to asbestos was hazardous, (2) employees' work clothing was contaminated, and (3) such clothing could expose employees' households to asbestos. Alcoa's industrial hygiene department has allegedly known of asbestos dust at its Tennessee facilities since the 1940's. The level of asbestos dust at its facilities in 1968 were allegedly so high that Alcoa received complaints from the workers' union. In 1965, internal Alcoa correspondence allegedly noted that even intermittent exposures to asbestos over long periods of time could result in asbestosis and lung cancer. In 1968, members of Alcoa's industrial hygiene department published a book allegedly identifying asbestos as a human carcinogen and stating that asbestos dust could cause cancer even in persons who lived near facilities using asbestos. In 1973, an internal Alcoa memorandum discussing steps to minimize asbestos dust allegedly recommended the prohibition of (1) shaking coveralls, (2) cleaning dusty clothes with air guns, and (3) wearing street clothes while handling asbestos materials. Alcoa also allegedly evaluated the coveralls worn by employees exposed to asbestos and determined that the

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[7]In *West*, the plaintiffs sustained serious injuries in a head-on collision with another vehicle driven by an intoxicated driver. *West*, 172 S.W.3d at 549. Just moments prior to the accident, the intoxicated driver purchased gasoline from the defendant's convenience store. *Id.* at 548–49. The driver was so intoxicated that he could not pump the gas without the help of the defendant's employees. *Id.* at 549. The plaintiffs filed suit alleging that the defendant's employees were negligent in selling gasoline to a visibly intoxicated driver and helping him pump it into his vehicle. The trial court granted summary judgment in favor of the defendant, and this Court affirmed. *Id.* at 549–50. Before the Tennessee Supreme Court, the defendant presented an argument similar to Alcoa's—it owed no duty to the plaintiffs because it had no "special relationship" with the intoxicated customer. *Id.* at 551. The Supreme Court stated,

> [T]he defendant misconstrues the plaintiffs' claims as being based upon a "special relationship" arising from the sale of gasoline to Mr. Tarver (the intoxicated driver). *The plaintiffs' allegations do not revolve around any duty of the defendant to control the conduct of a customer*. Instead, the claims are predicated on the defendant's employees' affirmative acts in contributing to the creation of a foreseeable and unreasonable risk of harm, i.e., providing mobility to a drunk driver which he otherwise would not have had, thus creating a risk to persons on the roadways. *Viewed in this light, the balancing test set out above is appropriate to determine whether the defendant owed the plaintiffs a duty*.

Id. at 551 (emphasis added).

coveralls contained "5 fibers per cubic centimeter of asbestos dust." In 1968 Alcoa's industrial hygiene department allegedly obtained a newspaper article reporting that wives and children had contracted various illnesses, including mesothelioma, from asbestos-contaminated work clothing.

Treating these allegations as true, Alcoa should have understood that the risk of injury to someone like Ms. Satterfield was a reasonably foreseeable probability.

The foreseeability of Ms. Satterfield's injury is further buttressed by the severe gravity of the possible harm—mesothelioma and subsequent death. "[T]he degree of foreseeability needed to establish a duty of care decreases in proportion to the magnitude of the foreseeable harm. 'As the gravity of the possible harm increases, the apparent likelihood of its occurrence need be correspondingly less to generate a duty of precaution.'" *Pittman v. Upjohn Co.*, 890 S.W.2d 425, 433 (Tenn. 1994) (quoting *Prosser*, § 31, at 171).

Alternative conduct that would prevent such secondary exposure was feasible and would involve a minimal burden, i.e., warning employees not to wear work clothing home, providing protective clothing, encouraging use of changing–bathing facilities, and laundering work clothing on-site. The Complaint alleges, however, that Alcoa did not provide warnings or protective clothing and that Mr. Satterfield's supervisors discouraged use of the bathhouse. Based on the foregoing, the foreseeable probability and gravity of harm posed by Alcoa's conduct outweighed the burden upon Alcoa to engage in alternative conduct that would have prevented the harm; therefore, Alcoa's conduct presented an unreasonable risk to employees' households and gave rise to a duty to act with due care to protect such households from secondary exposure to asbestos.

Alcoa argues that the weight to authority from other jurisdictions does not support a duty of care upon Alcoa, and relies primarily upon *Holdampf v. A.C. & S., Inc. (In re New York City Asbestos Litig.)*, 840 N.E.2d 115 (N.Y. 2005) and *CSX Transp., Inc. v. Williams*, 608 S.E.2d 208 (Ga. 2005). Both of these cases are distinguishable because they reached their holdings without any discussion of foreseeability.

In *Holdampf*, a husband and wife sued the husband's employer to recover for the wife's mesothelioma allegedly caused by exposure to the husband's asbestos-contaminated work clothing. *Holdampf* , 840 N.E.2d at 116–17. During the subsequent appeal to the Court of Appeals of New York, the plaintiffs began their analysis by arguing that the wife's injury was foreseeable. *Id.* at 119. The Court of Appeals dismissed this argument by noting that under New York law "foreseeability bears on the scope of a duty, not whether a duty exists in the first place." *Id.* The plaintiffs also urged the Court of Appeals to follow New Jersey case law imposing a duty of care upon employers under such circumstances, but the New York Court of Appeals noted that New Jersey's case law "is distinguishable legally in that New Jersey, unlike New York, relies heavily on foreseeability in its duty analysis." *Id.* at 122. Having heard the plaintiffs' arguments, the Court of Appeals concluded that imposing a duty upon the defendant to prevent the wife's injury would raise the possibility of limitless liability; therefore, the Court of Appeals affirmed the trial court's dismissal of the negligence claim. *Id.* at 122. Accordingly, the New York Court of Appeals based

its holding exclusively upon a policy analysis.

CSX Transp., Inc. involved four plaintiffs. *CSX Transp., Inc.*, 608 S.E.2d at 208. Three of these plaintiffs alleged that they were exposed to asbestos via their fathers' contaminated work clothing and contracted asbestos-related diseases. *Id.* The fourth plaintiff alleged that his wife's death resulted from exposure to his asbestos-contaminated clothing. *Id.* The Supreme Court of Georgia indicated that the Federal District Court[8] relied too heavily upon foreseeability when addressing "clothing exposure" cases. *Id.* 209. Without any discussion of the foreseeability of the plaintiffs' injuries, the Georgia Supreme Court reached its conclusion based solely upon New York case law:

> We conclude that the holding in [*Widera v. Ettco Wire & Cable Corp.*, 611 N.Y.S.2d 569 (N.Y. App. Div. 1994)] is consistent with negligence law in Georgia and hold that an employer does not owe a duty of care to a third-party, non-employee, who comes into contact with its employee's asbestos-tainted work clothing at locations away from the workplace.

Id. at 210. The *Widera* holding was based exclusively upon a policy analysis,[9] which the Georgia Supreme Court adopted:

> We recognize, as did the court in [*Widera*], that "in fixing the bounds of duty, not only logic and science, but policy play an important role. [Cit.] . . . . However, it must also be recognized that there is a responsibility to consider the larger social consequences of the notion of duty and to correspondingly tailor that notion so that the illegal consequences of wrongs are limited to a controllable degree. [Cit.] The recognition of a common-law cause of action under the circumstances of this case would, in our opinion, expand traditional tort concepts beyond manageable bounds and create an almost infinite universe of potential plaintiffs. Accordingly, we decline to promulgate a policy which would extend the common law so as to bring the . . . plaintiff[s] within a class of people whose interests are entitled to protection from the defendant's conduct."

CSX Transp., Inc., 608 S.E.2d at 209 (quoting *Widera*, 611 N.Y.S.2d at 571).

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[8]The plaintiffs filed suit in Federal District Court. *CSX Transp., Inc.*, 608 S.E.2d at 208. The Federal District Court denied the defendant's motions for summary judgment, but granted permission to seek an interlocutory appeal. *Id.* The United States Court of Appeals for the Eleventh Circuit granted the interlocutory appeal and certified the clothing exposure issue to the Supreme Court of Georgia. *Id.*

[9]Foreseeability is never discussed in the *Wedera* majority opinion. *Widera*, 611 N.Y.S.2d at 569–71.

The disregard for foreseeability considerations displayed in *Holdampf* and *CSX Transp., Inc.* is in contrast to the analysis used in Tennessee. In Tennessee, "the foreseeability prong [of the balancing test] is paramount because '[f]oreseeability is the test of negligence.'" *Biscan*, 160 S.W.3d at 480 (quoting *Linder Const. Co., Inc.*, 845 S.W.2d at 178). Alcoa argues that whether foreseeability is used to determine the existence of a duty or the scope of a duty is a distinction without a difference. Yet, this does not change the fact that New York and Georgia's highest courts reached these decisions without any discussion of foreseeability. Alcoa also cites other cases, but these are equally unpersuasive.[10]

More persuasive is the unanimous opinion of the New Jersey Supreme Court in *Olivo v. Owens-Ill., Inc.*, 895 A.2d 1143 (N.J. 2006) which utilized a balancing test similar to that in Tennessee. In *Olivo*, a husband filed a wrongful death action on behalf of his deceased wife. *Id.* at 1146. The complaint alleged that the wife "contracted mesothelioma as a result of her continuous exposure to asbestos dust that was introduced into the home on [the husband's] work clothes." *Id.* The trial court granted summary judgment in favor of the defendant, but the New Jersey Appellate Division reversed. *Id.* at 1147. The defendant appealed to the New Jersey Supreme Court.

The New Jersey Court first noted the importance of foreseeability in the assessment of duty: "Because the focus here is on the determination of a duty, foreseeability of harm weighs in that analysis as 'a crucial element in determining whether imposition of a duty on an alleged tortfeasor is appropriate.'" Id. at 1148 (*quoting Carvalho v. Toll Bros. & Developers*, 675 A.2d 209, 212 (1996)) (citations omitted). The court then found that the wife's injury was foreseeable:

> It requires no leap of imagination to presume that during the decades of the 1940's, 50's, 60's, and early 1980's when [the husband] worked as a welder and steamfitter either he or his spouse would be handling his clothes in the normal and expected process of laundering them so that the garments could be worn to work again. [The husband's] soiled work clothing had to be laundered and [the defendant], as one of

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[10] Alcoa also cites *Rohrbaugh v. Owens-Corning Fiberglass Corp.*, 965 F.2d 844 (10th Cir. 1992); *Adams v. Owens-Ill., Inc.*, 705 A.2d 58 (Md. Ct. Spec. App. 1998); *Rindfleisch v. Alliedsignal, Inc.*, 815 N.Y.S.2d 815 (N.Y. Sup. Ct., Erie County 2006).

Rohrbaugh is factually distinguishable. Although the injury in *Rohrbaugh* was mesothelioma resulting from exposure to asbestos via contaminated clothing, the defendant was a manufacturer of asbestos products, not an employer. *Rohrbaugh*, 965 F.2d at 845. Thus, the court held that the manufacturer had no duty to warn because secondary exposure via contaminated clothing was not a foreseeable use of the product. *Id.* at 846–47.

Adams and *Rindfleisch*, are legally distinguishable because neither case considered foreseeability. *Adams*, 705 A.2d at 66 (holding, without considering foreseeability, that the defendant–employer owed no duty of care to the employee's wife, who was exposed to asbestos via her husband's contaminated work clothing); *Rindfleisch*, 815 N.Y.S.2d at 817–21 (a trial court opinion following *Holdampf* and holding, without considering foreseeability, that the defendant–employer had no duty to prevent secondary exposure).

> the sites at which he worked, should have foreseen that whoever performed that task would come into contact with the asbestos that infiltrated his clothing while he performed his contracted tasks.

Id. at 1149. The court also noted the Appellate Division's assessment that the defendant could have engaged in safer, alternate conduct with relative ease.[11] *Id.* After balancing these considerations, the New Jersey Supreme Court found that the employer owed a duty of care:

> In weighing and balancing the relationship of the parties, the nature of the risk and how relatively easy it would have been to provide warnings to workers such as [the plaintiff] about the handling of his clothing or to provide protective garments, we do not hesitate to impose a derivative duty on [the defendant] for injury to plaintiff's spouse caused by exposure to the asbestos he brought home on his work clothing.

Id. at 1149–50.

Thus, the New Jersey Supreme Court imposed a duty of care upon the employer after balancing the foreseeability of the harm against the burden of the proposed duty, which is similar to this Court's balancing analysis. The New Jersey Supreme Court's highly persuasive *Olivo* opinion has also been followed by the Louisiana Court of Appeals, another jurisdiction that relies heavily upon foreseeability in its duty analysis. *Chaisson v. Avondale Indus., Inc.*, 947 So.2d 171, 183 (La. Ct. App. 2006).[12] The foregoing reinforces our conclusion that Alcoa owed Ms. Satterfield a duty of care.

Finally, Alcoa's argues that finding a duty in this case would result in a liability which

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[11]The New Jersey Supreme Court summarized the Appellate Division's assessment as follows:

> The panel concluded that [the defendant] was "in the best position to prevent the harm," and could easily have warned workers such as [the plaintiff] of the risks of asbestos exposure to his health, and the health of his wife. Moreover, [the defendant] could have taken measures such as providing changing rooms to reduce the risk of asbestos exposure.

Olivo, 895 A.2d at 1147.

[12]In *Chaisson*, the Louisiana Court of Appeals determined that "[the defendant–employer] owed a duty to [the employee's wife] to guard against her household exposure to asbestos from laundering her husband's [asbestos-contaminated] work clothes." *Chaisson*, 947 So.2d at 183. While discussing the New Jersey Supreme Court's *Olivo* opinion, the Louisiana Court of Appeals noted that "[l]ike Louisiana jurisprudence, *Olivo* relied heavily upon foreseeability when finding a duty." *Id.* at 183.

would be "unlimited" and would include any person who might foreseeably come into contact with an employee over the course of the day, such as waitresses, cab drivers, and laundry workers. On the contrary, our holding is the group of potential plaintiffs is limited and identifiable. The duty recognized here is limited to the foreseeability of harm to members of employees' households who routinely come into close contact with employees' contaminated clothing over an extended period of time. The risk of harmful asbestos exposure to such individuals is a reasonably foreseeable probability. Other individuals who might possibly come into contact with the employees' clothing, but whose contacts are sporadic or unpredictable, would be outside the scope of the employer's duty because the risk of harm to these individuals is only a remote possibility. Any potential plaintiff "must show that the injury was a reasonably foreseeable probability, not just a remote possibility." *Tedder*, 728 S.W.2d at 348. Moreover, the Louisiana Court of Appeals and the New Jersey Supreme Court have rejected identical "unlimited liability" arguments. *Chaisson*, 947 So.2d at 183;[13] *Olivo*, 895 A.2d at 1150.[14] We find this argument is without merit.

For the foregoing reasons, we reverse the Judgment of the Trial Court and reinstate this action for further proceedings consistent with this Opinion.

The cost of the appeal is assessed to Aluminum Company of America.

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HERSCHEL PICKENS FRANKS, P.J.

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[13]Louisiana Court of Appeals stated, "[T]he possibility of limitless liability is of no concern because finding a duty in this case would not create a categorical duty rule, but one based upon the facts and circumstances of this case." *Chaisson*, 947 So.2d at 183.

[14]The New Jersey Supreme Court stated,

> Although [the defendant] fears limitless exposure to liability based on a theory of foreseeability built on contact with [the plaintiff's] asbestos-contaminated clothing, such fears are overstated. The duty we recognize in these circumstances is focused on the particularized foreseeability of harm to plaintiff's wife, who ordinarily would perform typical household chores that would include laundering the work clothes worn by her husband. Accordingly, public policy concerns about the fairness and proportionality of the duty recognized today should dissipate.

Olivo, 895 A.2d at 1150.